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ABSTRACT

Many agencies of the Executive Branch of the federal government have at one time or another claimed an absolute right to wihhold any information they chose from anyone they chose. These claims have produced the Freedom of Information Act, which imposes some limitations on this absolute power. Recently, some members of Congress have become concerned about the government's use of the courts to enforce various secrecy claims. The first article in this issue of "Free Speech" concerning government control of information was written by Representative Jonathan Bingham of New York. This issue also contains remarks by Senator Muskie on secrecy, comments concerning Justice Black's position on public access, and a report of the ad hoc committee to evaluate the "Free Speech" newsletter. (TS)

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Free Speech

COMMISSION ON FREEDOM OF SPEECH
SPEECH COMMUNICATION ASSOCIATION

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CENSORSHIP THROUGH GOVERNMENT CONTROL OF INFORMATION

One result of the Watergate experience has been a renewed realization of the power held by those who can control the flow of information. Many agencies of the Executive Branch of the Federal Government (including, of course, the President) have at one time or another claimed an absolute right to withhold any information they choose from anyone they choose. These claims have produced the Freedom of Information Act which imposes some limitations on this absolute discretionary power. Expanding and improving this legislation has been a matter of continued attention in Congress.

More recently some members of Congress have become concerned about the government's use of the courts to enforce various secrecy claims. In the celebrated Pentagon Papers case the Executive Branch sought to prevent publication by obtaining court injunctions. While the Supreme Court eventually ruled against the government, several of the Justices stated that under some circumstances they might have upheld the injunctions. Since then the Supreme Court has let stand injunctions against publication obtained by the Central Intelligence Agency. This censorship by injunction is the target of legislation introduced by Representative Jonathan Bingham of New York. His remarks upon introducing this legislation providing an excellent review of the issue were, in part, as follows:

Mr. Speaker, the most historic case before any court of the United States this year has almost certainly been *Knopf v. Colby*, 509 F2d 1362, the second chapter of the constitutional crisis first addressed in *U.S. v. Marchetti*, 466 F2d 1309 (4th Cir., 1972). The case is a painful first in the history of the first amendment--the first and only time that a court has used the power of the injunction to assist the Government in restraining the exercise of basic first amendment freedoms. In the language of the lawbooks, the two Marchetti cases effected a "prior restraint" on both freedom of the press and freedom of speech. To use blunter language, the case involves the unprecedented censorship of a book by the Government.

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SALE OF TERM PAPERS UPHELD

Baltimore County Circuit Court Judge John N. Maguire yesterday ruled that Maryland's law banning the sale of college term papers violates constitutional guarantees of free speech. In declaring the 1972 law invalid, Maguire overturned the lower court conviction of Harry R. McNulty Maguire said the law is "overbroad" in covering term paper vendors who are not aware of the purchaser's intention of submitting the document as his own work. But he said the state has a right to preserve the integrity of Maryland schools by prosecuting "persons who seek to aid in the fraudulent submission" of research papers, and the General Assembly is expected to be asked to tighten the law.

(Rochester) *Times-Union*, August 12, 1975, p. 2A.

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SENATOR MUSKIE ON SECRECY

One of those members of Congress who has been concerned about the issue of government secrecy in many of its forms is Senator Edmund S. Muskie of Maine. This concern is reflected in his comments on three different pieces of legislation being considered by the Senate. The first comment is on bill S.1 which is intended to recodify the Federal criminal code but also contains sections that would provide new criminal sanctions to enforce censorship. The second commend reflects the frustration felt by many in Congress over the reluctance of the Executive Branch to provice information when requested to do so. The third comment deals with an attempt by Senator Muskie to work out a system to balance the competing demands of the right to know and the need for national security secrecy.

Mr. President, more than 2 years in the wake of Justice Department efforts to prosecute Daniel Ellsberg for the disclosure of the Pentagon papers history of our involvement in Vietnam, the administration put forward a bill (S. 1400) which would have recodified the Federal Criminal Code.

Hidden deep in that lengthy and complex legislative proposal were five sections which, taken together, would have established in peacetime a system of governmental censorship that a democracy could hardly tolerate in a time of war.

That proposal went far beyond any laws which we have ever had even during the emergencies of World War I and World War II. In that the proposal would have given the Government the power to prosecute newsmen not only for revealing what they determine the public should know, but just for possessing information the Government says they should not have, it constituted no less than a "national Secrets Act."

S. 1400 died without action in the 93d Congress. It has, however, found a successor in S. 1 which is presently before the Senate Judiciary Committee.

While there have been improvements in S. 1 from the version which was offered in the last Congress many of its sections--particularly those dealing with the revision of the espionage laws--raise serious questions affecting the first amendment rights of the press in a democracy and the need for that fourth estate of Government to keep a watchful eye on the operations of the other three.

Under the new proposal, a reporter who catches the Government in a lie, who uncovers fraud, who unearths examples of monumental waste, could go to jail.

Such a law would force journalists to rely upon self-serving press releases manufactured by timid bureaucrats--or risk going to jail for uncovering the truth.

A former member of my staff, Mr. Dan Lewis, who is now practicing law in Washington, and who is very familiar with the proposed revisions in the Federal Criminal Code has prepared a memorandum which discusses each of the problems posed by the administration proposal. It is worth noting some of the observations he makes in his study.

For example, section 1123 of S. 1 would forbid communications which are defined to include any act of making information "available by any means to a person or to the general public." Therefore, giving this information to a newsman and its publication by the press or electronic media would constitute a felony.

The newspaperman, the editor, the press man, even the newspaper delivery boy would commit a crime under this section. In fact, anyone who aided in making the communication would be considered an accomplice.

Newspaper publishers and television station owners would be no less covered by the act for the crimes of their agents. Under such a proposal if information were properly obtained from a foreign government or from a foreign press source or even from direct observation, it would fall within the proscriptions of this section.

For example, if a journalist printed information about the secret U.S. bombing in Cambodia during the Vietnam war, and that information had not been officially released, such a press report would be a crime, even if the journalist obtained the information by his own direct observation or through a foreign press report.

Even more important certain sections of this bill would make the act of communicating certain information a crime even if such communication was made with no intent to harm the United States or to aid its enemies. The act requires no mens rea or the intent to do wrong which is fundamental to our criminal law.

While the objectives of S. 1 were to simply recodify the existing Federal criminal law, we find the scope of the proposed National Secrets Act to bear little resemblance to existing espionage laws which generally limit criminal prosecution to espionage as it is traditionally understood. The present espionage laws have been limited by the Congress and the courts to cover specifically enumerated types of vital secret information; to require that persons charged have intended to injure the United States, or have an intent to do wrong; and that they be applied to the transmission of information which would in in fact cause an "injury" to the United States or be used to the advantage of a foreign nation.

U.S., *Congressional Record*, 94th Cong., 1st sess., S 15078-15082.

(Continued on p. 7)

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It is ironic that both U.S. against Marchetti and Knopf against Colby have been refused the attention of the U.S. Supreme Court. By turning down the petitions for writs of certiorari in these cases, the Court has left standing as the law opinions by the Fourth Circuit's Judge Haynsworth which are patently repugnant to the first amendment. I believe that a review of the facts of the entire case, and of the historic principles involved, will make it clear that Judge Haynsworth's opinions in U.S. against Marchetti and Knopf against Colby are a major blot upon the first amendment, one that can and must be reversed by appropriate legislation.

The Case

Victor L. Marchetti was employed by the CIA in October 1955. He resigned from the Agency in September 1969, after having held posts that included that of Special Assistant to the Deputy Director.

Following his resignation from the CIA, Mr. Marchetti signed a contract with Alfred A. Knopf to write a nonfiction book about the CIA. This book was finally published by Knopf, in 1974, under the title "The CIA and the Cult of Intelligence." The 168 deletions that so prominently mar that book are testimony to the success of 3 years of litigation by the U.S. Government and the CIA, which diligently pursued the aim of censoring Marchetti's book. The Haynsworth decisions in the Marchetti cases are the legacy of this massive effort to gain judicial approval of governmental censorship.

Litigation in the case was begun on April 18, 1972, when the United States went into court to request temporary injunctive relief--which later became permanent--against the real or imagined threats posed by Marchetti's writings. The permanent injunction that was eventually issued against Marchetti is as extraordinarily broad as it is unprecedented. It required then--and still requires now--that Marchetti submit to the CIA "any manuscript, article or essay, or other writing, factual, fictional, or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources of methods;" and it authorizes the Director of Central Intelligence, within 30 days, to order deleted "any classified information relating to intelligence activities, (and) any classified information concerning intelligence sources and methods." The injunction exempts from its scope classified information which has been placed in the public domain by the United States.

This first round of litigation in the Marchetti case was conducted in the shadow of the Pentagon Papers case, *New York Times Co. v. U.S.*, 403 U.S. 713 (1971). There, of course, the Supreme Court had explicitly refused--on first amendment grounds--to enjoin the publication of highly classified documents by the New York Times and the Washington Post. Stressed the Court in its per curiam opinion--quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)--

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.

Both the district court and the court of appeals, however, in U.S. against Marchetti, gave barely a nod in the direction of N.Y. Times against U.S. What distinguished the Marchetti case, said the Court, was the fact that Marchetti had signed a contract with the CIA in which he had agreed never to make public classified information which he had come across while employed by the CIA. The district court had stated the matter directly:

> In the opinion of the Court the contract takes the case out of the scope of the First Amendment; and, to the extent the First Amendment is involved, the contract constitutes a waiver of the defendants' rights thereunder. It is these documents that the Court feels distinguish this case from *New York Times Co. v. U.S.*, 403 U.S. 713 (1971), and render it no more than a usual dispute between an employer regarding the revelation of of information obtained by that employee during his employment. Consequently, there is no prior restraint and no such heavy burden on the United States to show irreparable damage to the country as was imposed by *New York Times*.

Round One ended with the Supreme Court refusing certiorari, 409 U.S. 1063--three Justices dissenting. The fourth circuit's opinion stood: the Government could henceforth make use of court injunctions to censor books prior to publication. Twenty years after signing a secrecy agreement, a former government employee could and would find himself unprotected by the first amendment.

The absurdity of attempting to fashion a watered-down version of first amendment rights based on waivers, creating a legal territory on which free speech cases suddenly find themselves transformed into "no more than a usual dispute" over the provisions of a contract, has been amply illustrated by round 2 of the Marchetti controversy. Together with Jonathan Marks, Marchetti completed his CIA manuscript for Knopf. Pursuant to the injunction, he then submitted the

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manuscript for censorship to the CIA. The CIA originally made 339 deletions; these were later negotiated down to 225, and then again to 168.

Objections to these 168 cuts were the basis for the proceedings that have now produced the Byzantine logic of Knopf versus Colby.

The district court upheld only 28 of the CIA's 168 deletions. It found that in the other 140 cases, there was no persuasive evidence that the material had actually been classified. Said the Court:

> The decision as to each item here in question by an individual Deputy Director seems to have been made on an ad hoc basis as he viewed the manuscript, founded on his belief at that time that a particular item contained classifiable information which ought to be classified.

It should be noted that the district court was asserting no constitutional right on behalf of Knopf and Marchetti in its decision. Rather, it was merely finding that as a matter of fact 140 of the CIA's deletions dealt with material that the CIA could not show was classified, and which thus--under the decision of the court of appeals--could not be deleted.

The court of appeals reversed these findings of fact. In order to justify this reversal, Judge Haynsworth enunciated in his opinion a hitherto undiscovered lynchpin of constitutional law, known as the "presumption of regularity" in the decisions of government officials. Given this presumption, said the court, the Government did not need to show any actual proof that a piece of information had actually been classified; rather, it had merely to argue that the information was "classifiable," and that it was contained somewhere in a document with a classification stamp on it. Actual evidence, though "nice," is unnecessary, said the court. It was from this basis that Judge Haynsworth proceeded to detail the nature of the Government's "burden" in such a case as Marchetti's. Not surprisingly, he found that the Government had met that "burden" in each of the 168 instances where it was attempting to do so.

Other peculiar exercises indulged in by Judge Haynsworth in Knopf are now also on the verge of being incorporated into our venerated first amendment. The original injunction against Marchetti did not include a prohibition against publishing material that had entered the public domain. Marchetti, Marks, and Knopf claimed that 74 items among the 168 deletions had been discussed publicly, and showed this at trial with congressional hearings, newspaper and magazine articles, and a transcript of a television program. Public domain? No, said the district court, in a ruling that the court of appeals affirmed; no, despite the fact that "It does, of course, put Marks and Marchetti in a position of being unable to write about matters that everyone else can write about." The court of appeals elaborated:

> Rumors and speculations circulate and sometimes get into print. It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.

In other words, "highly sensitive" information can be bandied about by the press only so long as the American public entertains some doubt as to its authenticity. Cross the barrier between "rumors and speculations" and facts, however, and you leave the first amendment behind.

Such surprises abound in the jurisprudential territory opened up by Knopf; behind every news-stand there lurks a censor, equipped with a "presumption of regularity." As a final instance of this, let us take the court of appeals' reversal of the district court on the issue of whether Marchetti could publish information"which was either learned by them outside of their employment or was learned both during their employment and afterwards and would have been learned afterwards "in any event." The district court held that as a matter of fact, seven deleted items fell within this category; as a matter of law, it held that these items could be published, since the secrecy agreement in Marchetti's employment contract--which was the basis for the original injunction--quite clearly did not cover matters learned of after the termination of Marchetti's employment. The court of appeals agreed with the latter point of law, but rendered it meaningless with another presumption. Said Judge Haynsworth:

> Regardless of the District Court's finding of fact, neither (petitioner) should be heard to say that he did not learn of information during the course of his employment if the information was in the Agency and he had access to it. At least, a substantial presumption should be raised against him.

Rather than continuing to plunge down through this Kafkesque abyss of lamb-like burdens and maniacal presumptions, I shall cut off discussion of Judge Haynsworth's opinion: given the presumption of an after-life, it is clear that the eloquence of Justice Black's outraged ghost

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must be drowning out my own words anyway. So that I here retreat from the perils of Knopf against Colby, to return to the more familiar principles of the first amendment; based upon a discussion of these principles, I believe, a reasonable approach to the problem of security secrets versus the first amendment can be suggested.

Prior Restraint and the First Amendment

The first amendment's strictures upon prior restraints directed against freedom of the press and of speech are so elementary to our constitutional Government that they hardly require any detailed review. Justice Black wrote:

> Both the history and the language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, and prior restraints. *New York Times Co. v. U.S.*, 403 U.S. 713, 715.

Wrote Justice Douglas, citing the definitive modern treaties on the first amendment (Zachariah Chafee's "Free Speech in the United States" (1941), and Thomas Emerson's "The System of Freedom of Expression" (1970):

> It is common knowledge that the First Amendment was adopted against the widespread use of seditious libel to punish the dissemination of material that is embarassing to the powers that be.

The landmark case in the development of the law of prior restraint is, of course, *Near v. Minnesota*, 283 U.S. 697 (1931). Chief Justice Hughes' opinion there definitively stated what a reading of history already revealed: that the "chief purpose of (the First Amendment's) guarantee (is) to prevent previous restraints upon publication." *Near v. Minnesota*, supra, at 713. In speaking of the Near case, Chief Justice Hughes justified "the immunity of the press from previous restraint" in terms that are as applicable to the Marchetti case as they were to the Pentagon Papers case, or *Near v. Minnesota* itself:

> While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape.
>
> Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect emphasizes the primary need of a vigilant and courageous press . . . The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.

Whether any circumstances can justify the imposition of prior restraints on the press has been a topic of hot debate. The range of language in the Times against United States case indicates the significant differences of opinion on the question. The per curiam opinion of the Court hedged, stating merely that any system of prior restraints "comes to this court bearing a heavy presumption against its constitutional validity," (citing "Bantam Books," *Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and that with regard to any restraint, the Government "carries a heavy burden of showing justification." Justices Black and Douglas went further. Justice Douglas asserted:

> The First Amendment "leaves . . . no room for governmental restraint on the press.

Justice Brennan, on the other hand, identified "a single, narrow class of cases in which the first amendment's ban on prior judicial restraint may be overridden--such cases may arise only when the Nation "is at war," *Schenck v. United States*, 249 U.S. 47, 52 (1919), during which times "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota*, 283 U.S. 697, 716 (1931)." Justice Stewart stated the matter negatively. He wrote:

> I am convinced that the Executive is correct with respect to some of the documents (the Pentagon Papers) involved. But I cannot say that disclosure of any of them will surely result in direct, immeidate, and irreparable damage to our Nation or

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> its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us.

It is important to note that all of those opinions in the Times case which indicated that some prior restraint might be justified, stated that the government's case against publication of the Pentagon papers was substantially weakened by the absence of any relevant legislation by Congress. Justice White wrote:

> At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press.

Interestingly, those in accord with this position include--or at least did once include--Mr. William Colby. The CIA's Director has sought in the past, and continues to seek, legislation which would criminalize the disclosure of classified information, and which would provide the CIA with the authority to seek injunctive relief against such disclosures. In a letter introduced at trial during the Marchetti case, Colby conceded that no authority to seek suitable injunctive relief currently exists:

> Prevention of disclosure in order to avoid serious damage to the intelligence collection effort better serves the national interest than punishment after disclosure; however, <u>there is no existing statutory authority for injunctive relief</u>. (Emphasis added.)

It would certainly be interesting to know at what point the Government decided that old-fashioned contract law could be fashioned into an adequate substitute for the explicit "statutory authority for injunctive relief" whose absence Mr. Colby once viewed with such concern.

What I propose today is that the Congress make available suitable injunctive relief in a specifically defined range of cases. By carefully and narrowly defining that range, we will eliminate such unwarranted and lawless use of prior restraint as was approved by the fourth circuit in the Marchetti case. At the same time, we may expedite the lawful handling of cases where a matter seriously affecting the national security is legitimately involved . . . .

Section 2 of my bill adapts the language of Justice Stewart, quoted above, and sets out the following general guidelines for when an injunction may issue against publishing the news:

> The District Courts of the United States are hereby empowered to grant the petition of the United States to enjoin speech, or the printing or publication of any matter, if and only if the Government has both alleged and proved that communication of such matter will surely result in direct, immediate and irreparable damage to the security of the United States or its people.

The key phrase here is, of course, "such matter will surely result in direct, immediate and irreparable damage to the security of the United States or its people." This formula, while adaptable to a variety of situations, is meant to be interpreted as narrowly as possible. Clearly, it would permit prior restraint in such a situation as was described by Chief Justice Hughes in Near against Minnesota--that is, where there is a threat to publish the sailing dates of transports during wartime. *Near v. Minnesota*, supra at 716. It would also include the non-wartime situation hinted at by Justice Brennan in Times against U.S., where the publication of information might somehow--in a manner that the Government would be obliged to set out specifically--"set in motion a nuclear holocaust." I suggest that even during peacetime, certain crucial military information could be suppressed. I would hope that congressional hearings will consider in detail the question of when information about intelligence gathering would be considered so vital to the national security as to justify prior restraint. Censoring accounts of the identities and activities of agents currently in dangerous positions abroad comes quickly to mind as a fruitful topic for discussion: I am certain, too, that the Congress will want to give attention to a number of other situations where the "irreparable damage" threatened is to something less than the "security of the United States or its people."

What would clearly not be included among permissible prior restraints under section 2 are injunctions against the kind of information that the Government attempted to suppress in the Pentagon papers, and which it has successfully suppressed in the Marchetti case; information whose release threatens no lives, but which would prove

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embarassing to the Government. The Pentagon papers are a clear case of such embarassing information; the tragic, stubborn, unforgiveable blindness of the Nation's leaders was revealed, but no lives were lost as a result of publication, nor was the Nation rendered suddenly vulnerable to enemy attack. Similarly with Marchetti: the suppressed information in his book would help reform our estimate of the virtues inherent in the recent conduct of U.S. foreign policy, but obviously would not have suddenly crippled the Nation in any way--we note that nothing in court opinions ever indicated that release of the information would have posed any genuine danger "to the United States or its people."

U.S., *Congressional Record*, 94th Cong., 1st sess., H 7167-7170.

PRESS-FREEDOM FEUD BOILS OVER IN A QUEENS SCHOOL

A long-smoldering feud between the strict-disciplinarian principal of a Queens high school and the more permissively inclined administration of the city school system broke into open warfare yesterday over the issue of freedom of the student press.

Over the outraged objections of Dr. Howard L. Hurwitz, the principal of Long Island City High School, a group of high school officials and security guards entered the school and distributed 3,000 copies of a special edition of the student newspaper containing a student's article that the principle had suppressed for nine months.

"I regard this action on the part of Chancellor [Irving] Anker as disgraceful, outrageous and reprehensible," said Dr. Hurwitz, who declared his intention to sue the Chancellor for $1-million for "interference and harassment."

The article was written by Priscilla Marco, a senior and student in a journalism class. It discussed a Board of Education pamphlet on students' rights and responsibilities and questioned the refusal of Dr. Hurwitz to permit the pamphlet's distribution at the school as required by the board.

Dr. Hurwitz has rejected the pamphlet because it listed "too many rights and not enough responsibilities." And the student's article, he said, was full of inaccuracies and was "irresponsible and badly written." He had refused to allow its publication in the student paper, The Skyline, since it was submitted last October.

The special edition distributed yesterday was printed at Mr. Wilner's direction and carried a banner headline: "An Issue of Free Press." In addition to the original Marco article and a revised version by the same student, the single-sheet paper contained an "open letter" by Mr. Wilner and Samuel Polatnick, the executive director of the division of high schools.

The New York Times, June 24, 1975, p. 35.

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Mr. President, today I am introducing, with Senators Roth, Abourezk, and Javits, legislation which I believe will give the Congress the means to halt the steady erosion of its power by officials who arbitrarily withhold information needed to legislate and to oversee the workings of programs Congress has authorized.

Only 11 months ago, this Nation was embroiled in a conflict between two branches of the Government of such dimensions that it threatened the foundation of our system.

It is testimony to the durability, the resiliency and the lasting strength of our 200-year-old systems of checks and balances, that the highest court in the land ordered the Chief Executive to produce materials withheld under a claim of privilege; that the same order precipitated the first resignation of a U.S. President, and that we smoothly made the transition to a new administration with little or no disruption in the chain of governing authority.

Earlier in the sequence of events which also had brought the House of REpresentatives close to a vote on the question of impeachment, the district court for the District of Columbia said that the Senate Select Committee on Presidential Campaign Activities lacked standing to seek production of many of the same materials which were the subject of the later famous case of United States against Nixon, President of the United States.

The Congressional Right to Information Act would, for the first time in the history of our country, provide a practical and a just way to solve the controversies between the legislative and executive branches as to what information the Congress is entitled in order to carry out its constitutional functions.

If the Congress is to legislate, if the Congress is to conduct investigations, if the Congress is to appropriate funds for the operation of the Government, then the Congress must have all of the information in the possession of the executive branch of Government which it finds necessary to fulfill those responsibilities.

In his book on the subject of "Executive Privilege," Harvard law professor, Raoul Berger, observed:

> He who controls the flow of information rules our destinies . . . It was not the design of the Founders that the people and the Congress should obtain only so much information as the President concluded was fitting for them to have. As a partner--as the senior partner--in the conduct of our government, the Congress is entitled to share <u>all</u> the information that pertains to its affairs.

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Certainly the experiences of Teapot Dome, of Vietnam, and of Watergate, have shown that the abuse of delegation authority cannot be discovered, disclosed, identified, or restrained if the disclosure of information itself is controllable only by the executive branch.

Mr. President, this legislation represents a truly moderate and restrained congressional response to the recent history of immoderate and unrestrained exercise of Executive authority in the form of withholding information from the Congress.

The bill would direct the head of every Federal agency to keep the committees of the Congress fully informed on all matters within their jurisdictions.

It further would mandate every Federal official or employee to comply with congressional requests for information unless the President specifically instructs them in writing not to do so.

If a request for information is denied, a committee chairman would be authorized to issue subpenas to compel the production of the information sought. The committee would determine that the information is necessary to its legislative function, and the chairman could be authorized to issue a subpena, notwithstanding the Presidential instruction.

Should the Federal official refuse to comply with the subpena, the committee chairman could seek authorization from the particular House to initiate a civil action in the U.S. District Court for the District of Columbia to enforce the subpena.

The district court would be given jurisdiction over such actions and the power to enforce the subpenas by mandatory injunctions or other appropriate order. The court also could modify the subpenas or set them aside entirely.

Many Americans were shocked 2 years ago when the Attorney General Kleindienst came before a joint hearing by the Government Operations Subcommittee on Intergovernmental Relations and the Judiciary Subcommittees on Separation of Powers and Administrative Practices and Procedures and asserted that the Congress could only obtain information the President consented to disclose. He maintained:

> Your power to what the President knows, is in the President's hands.

We have attempted to answer that sweeping claim with this legislation. It is designed to implement the fundamental constitutional principle of the checks and balances between the three branches of Government . . . .

At the request of Senator Roth and myself, Senator Ervin was generous enough to provide us with his views on the importance of this legislative effort.

In a recent letter he said:

> My experiences as Chairman of the Senate Select Committee on Presidential Campaign Activities, and my long study of executive privilege have convinced me that some remedy short of the drastic alternatives of contempt of Congress or the power of the purse is necessary for proper congressional access to information. The Congressional Right to Information Act would have provided a very reasonable remedy.
>
> In the absence of a jurisdictional statute applicable to all committees, we are left with begging an executive agency to turn over information or resorting to more severe alternatives every time a committee needs information to carry out its legislative functions.

Even more recently, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities has met with considerable resistance in its efforts to obtain information to carry out its mandate from the Senate.

Upon learning of our intention to reintroduce this bill, the distinguished chairman of that committee, Senator Church, wrote:

> . . . I have come to appreciate the need for swift determination of controversies between the legislative and executive Branches over access to information in the hands of federal agencies. The Select Committee and its staff have spent weeks, indeed, months, locked in debate with the federal intelligence agencies over this matter, and I cannot say that even now we have evolved procedures which will provide the Committee all the information it needs to fulfill its mandate.
>
> . . . had a bill with the purposes of the Congressional Right to Information Act been on the books, the Committee would have had the benefit of carefully refined procedures and the means to receive prompt judicial enforcement of its requests for information.

U.S., *Congressional Record*, 94th Cong., 1st sess., S 13491-13494

"Muskie on Secrecy"

Mr. President, the practice of government secrecy gives a higher priority to confidentiality than to candor. It encourages deception instead of disclosure. And it feeds the suspicion of many Americans that their Government will not tell them the truth.

Yet, we all realize that a degree of secrecy is essential to protect our defense and to promote the success of our foreign policies in a world where nations hostile to our interests hold both the power and the intent to undermine our cause and that of freedom.

In our democracy there is an inherent conflict between the need for secrecy and the need for a fully informed public. The only answer to that conflict is to find the balance between a society that is open and one that is dangerously exposed.

Certain institutions of our Government have by tradition and neglect been permitted to operate without public or congressional scrutiny. The inevitable result of such isolation in a society which encourages a free and aggressive press is the rush to make public long-hidden transgressions by Government agencies and officials.

This process of public cleansing is important to the restoration of order andproper control to various parts of the Government, but it necessarily results in a temporary loss of effectiveness.

It is better to assure that the operation of Government is continuously subject to proper oversight by the people and their representatives so that openness is ongoing and not merely cyclical.

What has been ongoing, however, is the dispute between the Congress and the President over material which has been stamped secret by the executive branch.

Mr. President, the legislation I introduce today with the cosponsorship of the distinguished senior Senator from New York (Mr. Javits), the Government Secrecy Control Act, is an effort to restore the balance between secrecy and accountability by restoring the balance between the powers of the executive and legislative branches over national security policy and the information essential to its determination.

Hearings on similar legislation which we introduced in the 93d Congress were held in May and June of last year. Since that time, the importance of such a measure to resolve the conflict has become ever more apparent . . . .

The legislation I introduce today approaches the problems of secrecy from the perspective of sharing a constitutional power--the power to withhold or disclose sensitive information.

By default and inaction, responsive to the perceived, leading role of the President in dealing with cold war tensions, the Congress has permitted that power over information to lodge exclusively in the Executive. The result of our one-way grant of discretion over secrecy policy has, inevitably, been abuses of power, a system of information classification which serves neither the interests of intelligent policy making nor the requirements of an informed citizenry.

Classification stamps on documents no longer serve to protect information from disclosure. On the contrary, a "secret" marking on an official document often makes officials and journalists suspect that the contents are being hidden from the public more to conceal mistaken or questionable actions, than to promote national security. . . .

If we understand that decisions on requiring or dropping secrecy are essentially matters of individual judgment where precise standards cannot be automatically applied to every case, then we realize that the surest way to regulate the thousands of officials who must make such judgments daily is to subject their decisions to continuous, impartial review. The review procedures in Executive Order 11652 are a step in the right direction, but the step is incomplete. All of the review is carried out inside the executive branch, and most of it is carried out at the lower policymaking levels of the very agencies where the volume of classified information--and of information improperly classified--is greatest.

The Government Secrecy Control Act would strengthen that review process within the executive branch. But, more importantly, it would expand the review power to Congress. By sharing the discretion to impose and maintain secrecy, the legislation would assure that the difficult, delicate, individual judgments about secrecy are checked and rechecked. Only through such thorough review can we establish that elusive, essential balance between secrecy and openness.

U.S., *Congressional Record*, 94th Cong., 1st sess., S 16723-16726.

HAIMAN'S FREEDOM OF SPEECH

Franklyn S. Haiman, a former Chairman of the Freedom of Speech Commission, is now working on a revision of his textbook, Freedom of Speech: Issues and Cases, which was originally published by Random House in 1965. The updated edition will be one of a series of six books published under the joint sponsorship of the National Textbook Company and the American Civil Liberties Union. The other volumes in the series will deal with religious liberty, privacy, due process, racial equality, and sexual equality. In addition to his own book, Professor Haiman is serving as the general editor for the series of paperback books that will be issued as a Bicentennial Year publication.

JUSTICE BLACK WAS RIGHT

In the fact of a variety of attacks on freedom of the press, professional journalists are increasingly speaking out of the concept of free speech and its meaning in a democratic society. The American Society of Newspaper Editors has gone so far as to organize a group of editors to speak to the general public on First Amendment issues. Indicative of this new militancy is the commencement address by Anthony Day of The Los Angeles Times *at the University of California, Berkeley, School of Journalism this spring. The speech was placed in the* Congressional Record *by Senator Alan Cranston of California. Part of what Mr. Day said is as follows:*

I'm going to talk about something Berkely has had a good deal of experience with: Free Speech. In particular, the First Amendment.

It's in trouble. It's in trouble down in Fresno, where four newspapermen face jail terms for contempt for not revealing their sources. It's in trouble over in Texas, where a judge tried to keep the names of jurors--that were revealed in open court--out of the press. It's in trouble throughout California, where gag orders fall like rain from the bench and subpoenas, from defense and prosecution lawyers. And, as you all know, it's in trouble from the Supreme Court, which held in the Branzburg decision of 1972 that newsmen can be compelled to divulge their sources to grand juries.

The First Amendment is challenged by that old enemy of liberty, the government. It's challenged by those old friends of the free press, the judges and the courts. It's in trouble from the misconceptions of the citizens. And it's suffering from the negligence of newspapers themselves.

I think it's time for the American press to mount a much more aggressive and absolutist defense of the First Amendment than it has been doing. This means stiffening our backs against compromise. This means explaining to an often critical and skeptical public that our freedom is theirs, explaining why, as Justice Potter Stewart recently said, the press is the only organized private business given constitutional protection. It means explaining also that even while fairness is the ideal to which most of us aspire, the First Amendment doesn't guarantee fairness. All it guarantees is freedom--and that includes the freedom to be unfair. We have to keep explaining that the First Amendment doesn't guarantee the outcome of the contest of opinions, it just guarantees that there will be a contest.

We in the press should start arguing much more vigorously than we have been that the First Amendment, the kingpost of our liberty, is more nearly an absolute right than any right natural to man, or guaranteed in the Constitution.

The First Amendment, taken in its entirety, is the pre-eminent right in the Bill of Rights . . . .

Free speech is the means by which our other rights--habeas corpus, the fourth and fifth amendments and the others--are protected. The other nine rest on the first. Without the first, the other nine are defenseless. And the free press is the constitutionally protected agent of free speech.

Today, ideological zealots on the right and on the left--not all of them living in foreign dictatorships--believe that what is said, what is printed, should conform to their versions of the good society.

Therefore many revolutionaries of the right, and of the left, suppress free expression abroad, and would suppress it here if they could.

But they are not the chief danger here in the United States and I don't see their becoming a danger.

The danger to the free press in this country comes not from a dedicated people who understand what the free press means, and so oppose it, but from people who misunderstand what the free press means, and so, unknowing, are willing to see it chipped away bit by bit.

A lot of people think that things that make them uncomfortable, or which they disagree with, should never be printed. We get that kind of complaint every day.

An even larger number, I think, believe that for good and overriding reason the free press may on occasion be curbed.

This is the heart of the problem in the United States today. In the minds of the government, in the minds of the courts, in the minds of the people, in the mind of too many newspapers, the right to a free press is like all the other rights in the Bill of Rights, and equal to other parts of the Constitution, and so has to be balanced against them. . . .

Everyone knows the story of the Pentagon papers. Everyone knows the story of overclassification of government operations--even sections of the Pentagon papers are still "classified"--and so, in the government's opinion, not fit for common eyes--the eyes of you and me.

Less well known is that even now, in Congress, is a bill that would give the government a more sweeping grant of power to withhold information, and to prosecute those who divulge it--a grant of power so sweeping that is comparable only to the infamous Alien and Sedition Act.

If you don't know this bill you should. It goes under the innocuous title of Senate bill 1 "A Bill to Codify, Revise and Reform the Federal Criminal Code."

But listen to what it would do: make it a felony to collect or communicate "national defense information" with the "knowledge that it may be used to the advantage of a

"Day on Free Press"

foreign power . . .;" make it a crime to communicate "national defense information" to a person "he knows is not authorized to receive it;" cover all other persons who pass such information to third parties. (This provision is broad enough to embrace reporters, editors, publishers and members of Congress); make it a crime to pass classified information to "unauthorized persons"--regardless of intent and with the government under no burden to show that any harm resulted; make it a federal offense to conceal the identity of someone who may have committed a crime; make it a crime for anyone, including a reporter, to refuse to answer a question in an official proceeding after a court required an answer.

A casual observer may say, "But that is clearly unconstitutional, and the Supreme Court will strike it down, and save us."

Maybe so, but not necessarily so. The courts, from the lowest to the highest, conceive of their function as adjudicating between conflicting branches of government and between conflicting claims of right. And that is their function, which on the whole they perform well. But to judge between conflicting claims is to abridge one at the expense of another, and that is what is happening now with the First Amendment and the press.

It is happening in conflicts between the press and the executive branch of the government, and it is happening in conflicts between the press and the courts themselves.

Take the press and the executive branch.

It is widely supposed in our business that the Supreme Court decision in the Pentagon papers case was a victory for the press.

I hope we have no more such victories. For, while the court said that the newspapers could continue to publish the papers, the court majority also implicitly accepted that it had the power to review the matter before publication.

The court said Yes, Publish, but it implicitly confirmed the right of the court to say No, Don't Publish. I agree with the dissenting justices in that case, Black and Douglas, who argued that the court should have affirmed the absolute right of the papers to publish without any prior review at all by the courts. Prior review is the old enemy of free speech--another form of the license to print, and scarcely less insidious . . . .

And, just as an absolute interpretation of the First Amendment is the only sure defense for the press against the courts, so an absolute interpretation of the First Amendment in cases like the Pentagon papers is the only sure defense for the press against the government. Any law, like Senate Bill One, that attempts to describe what may and may not be published could, in the hands of courts acting under pressure from the government, bring about an indefinite delay in publication of information that could be crucial to the informed judgment by the public, and to an informed decision by elected representatives of the public. I am not arguing that the government may have no secrets; I am arguing that the government's tendency toward secrecy is so strong that the legal deck must be stacked against it--absolutely stacked against it on the matter of prior restraint. Better that a newspaper publish something damaging to the country, and have to suffer the consequences afterwards, than that the newspaper be forced to withhold publication of something which, if disclosed, would be of great benefit to the country.

There is great risk in all this. For who is to say what harms and hurts? That is exactly the central point about freedom of the press. There is ultimately no judge of such questions but the citizens, and there is no way for the citizens to make such judgment unless informed.

U.S., *Congressional Record*, 94th Cong., 1st sess., S 13581-13582.

PETE SEEGER SONGFEST IS CANCELED
AFTER FREE-SPEECH DISPUTE

Pete Seeger won't be singing under the ancient Balmville tree after all.

Today, a Bicentennial invitation to the folk singer to lead a songfest under the historic 276-year-old poplar was withdrawn as a result of a dispute over the rights of free speech and assembly.

Robert P. Ushman, president of the Balmville Citizens Association, said he was canceling the proposed ceremony, whose date had not yet been fixed, because the controversy over Mr. Seeger now seemed likely to draw huge crowds.

His action came only a few hours before the Newburgh Town Board, a majority of whose members had expressed objections to Mr. Seeger's political views and "left-wing" associates, seemed ready to reject an official request for the necessary traffic diversion.

The Town Supervisor, J. Malone Bannan, had said when the request was submitted that he felt "the majority of the board doesn't believe Mr. Seeger presents the American view many of us represent."

Dr. Edwin F. Klotz, the Superintendent of Schools, had objected to Mr. Seeger's "well known reputation as a left-extremist" and to his having entertained dissidents who later interrupted Bicentennial ceremonies in Concord, Mass., two months ago.

The New York Times, June 17, 1975, p. 35.

REPORT OF THE AD HOC COMMITTEE TO EVALUATE THE FREE SPEECH NEWSLETTER

Procedure

Members of the committee, plus the chairperson of the SCA Commission on Freedom of Speech, started the process by making independent reviews of their files of back issues of the newsletter and writing down their own impressions as to the strengths and weaknesses of the publication. Simultaneously a questionnaire was prepared and published in the Spring, 1975, issue of the newsletter soliciting reader feedback. This produced six responses from readers. All of this material was distributed to the members of the committee for their perusal, and each responded in writing. Out of this second set of responses, a clear concensus of the committee has emerged, and is reported below.

Evaluations and Recommendations

1. It is generally agreed that the Free Speech newsletter, in its 13 years of existence, under four editors, has been a consistently useful document. Each of the editors has handled his assignment somewhat differently, but it is felt that each made a distinct contribution and that the variety caused by different styles of editorship is, on balance, probably a good thing. However, it is felt that the time has now come, on the basis of the experience of these 13 years, to provide somewhat more guidance to future editors than has been given to past editors, so that a higher degree of consistency is achieved and some perceived needs for improvement met.

2. We believe that the newsletter should meet several needs: (a) providing news about the activities of the SCA Commission on Freedom of Speech, its convention programming, etc.; (b) providing aids, and stimulus, for teachers or would-be teachers of courses or course units on freedom of speech--e.g. sample syllabi or course outlines, exercises and assignments, source materials; (c) providing teachers, as well as researchers or more casual readers of the newsletter, with information about new books or journal articles which are particularly valuable in the field; (d) providing some information about significant new court opinions affecting freedom of speech--both from the Supreme Court and lower courts; (e) providing space for presentation of competing points of view; and (f) providing a sampling of significant news events around the country affecting freedom of speech, including major policy or position statements by leading organizations or agencies concerned with freedom of speech (ACLU, AAUP, FCC, FTC, ALA, NCTE, ABA, etc.) or by ad hoc committees (e.g. Yale Woodward Report, Stanford Report on Bruce Franklin case). It is suggested that each of these six functions might be served by six sections or departments of the newsletter, identified as such, so that the reader can more easily find what he might be interested in, and so that the newsletter has a more predictable and stable structure.

3. If the six functions identified above are to be fulfilled effectively we believe that the time has come to provide newsletter editors with some professional assistance. This could be in the form of an editorial board or committee, with each member assigned primary responsibility for one or two of the functions listed here. We think that the newsletter has outgrown, or should outgrow, the one-person show stage, if it is to fulfill adequately all of the functions described.

4. Commenting more specifically on each of the six functions we would make the following observations:

a. Every member of the ad hoc committee and every reader who responded to the questionnaire indicated that Commission activity news and reports about convention programming are an essential feature of the newsletter. It is felt that they have been well handled in the past, and that this should simply continue.

b. It is felt by members of the committee that we should do much more than we have done in the past to provide teaching aids for courses or course units in freedom of speech. Because of space limitations in a newsletter, these items would necessarily have to be rather abbreviated, but we believe that a high priority purpose of the newsletter is to help and encourage people in the teaching of freedom of speech, and that the best way to do this is to give concrete suggestions of teaching ideas.

c. Whether the newsletter reader be a teacher of freedom of speech, or someone with a non-teaching interest, we believe it is an important responsibility of the newsletter to call the reader's attention to valuable new books and journal articles which are appearing in print and to provide some indication of their contents. Neither space nor time would allow for the kind of extensive critical reviews that appear in journals of the profession, but brief notes are certainly feasible. The preparation of this section of the newsletter might well be delegated to a particular associate editor.

d. The reprinting of excerpts from court opinions--both U.S. Supreme Court and significant lower court decisions--has occupied a large place in past newsletters. We believe that this allocation of space has been disproportionately large, particularly the lengthy excerpts from Supreme Court opinions which ought to be readily available to most readers elsewhere. We would recommend the continuation of reporting on court opinions--again perhaps one department of the newsletter could be devoted to this--but

suggest that these reports be much shorter, simply summarizing highlights and possibly included a couple of choice quotations. Comments about the significance of the opinions would also be helpful. The task of maintaining this department of the newsletter might also be delegated to a particular associate editor.

e. The ability to include letters to the editor, op-eds, etc. depends, of course, on the willingness of readers to send them in. We do think, however, that more encouragement might be given to readers to do so and, with regard to op-eds in particular, they might be specifically commissioned to individuals who the editor thinks might have something interesting to say.

f. The handling of free speech news items from around the country is probably the most difficult problem, since there is so much to choose from and the selection must necessarily be arbitrary. Also, one person can't possibly keep on top of everything that's happening. Each editor is going to have to develop some systematic method of learning about, and selecting important news items, agency and organization policy statements, etc. It may be that each member of the editorial board could be made responsible for a region of the country, or perhaps one could be assigned to follow the New York Times, another the Congressional Record, another the ACLU or the FCC, etc. There are a variety of ways of dealing with this problem; our committee only notes that it is a problem which each editor should face and deal with at the outset of his tenure in office.

Conclusions

It is the hope of our committee that this report will be circulated to the members of the Commission on Freedom of Speech by the commission chairman and placed on the agenda for discussion by the Commission at its meeting in December. If the Commission agrees with our recommendations, we urge that they be formally endorsed at that meeting, so that they can then serve as official guidelines for future editors of the newsletter.

Respectfully submitted,
Haig A. Bosmajian
Barbara H. Ewbank
Peter E. Kane
Franklyn S. Haiman, Chairman

(This report will be discussed at the Freedom of Speech Commission business meeting at the SCA Convention. Additional suggestions are sought and should be sent to Commission Chairman Thomas Tedford, Department of Drama and Speech, University of North Carolina, Greensboro, N.C. 27412 - ed.)

FREE SPEECH AT SCA CONVENTION

The Freedom of Speech Commission is sponsoring two programs at the Speech Communication Association Convention in Houston this December. Both programs are scheduled for Sunday, December 28.

"The Eyes of Texas Are Upon You" 2:30 to 3:40 p.m. (a symposium on freedom of speech in the Lone Star State chaired by William Gordon)

"Responsible Use of Freedom of Speech" 4:00 to 5:20 p.m. (participants Christopher Johnstone and James Edward Sayer, chaired by Richard L. Johannesen)

The Commission will have its business meeting (open to the public) on Sunday, December 28 at 9:00 p.m. in a location to be announced in the convention program. Business now scheduled to come before the Commission is action on the Ad Hoc Committee Report published elsewhere in this newsletter and the formulation of recommendations for new officers and editors. To be selected for three year terms are a Commission Chairman, an Editor of Free Speech, and an Editor of the Freedom of Speech Yearbook. Chairman of the Nominating Committee is Dr. Alvin Goldberg, Department of Speech, University of Denver, Denver, Colorado 80210. He requests suggestions from the readers of this newsletter.

NATIONAL AD HOC COMMITTEE AGAINST CENSORSHIP

Because of concern over the erosion of First Amendment Rights in recent years, twenty-three organizations have come together to form the National Ad Hoc Committee Against Censorship. The groups, which include the Speech Communication Association, are a mixture of civic, professional, and religious organizations who formed this alliance from the shared conviction that freedom of thought, inquiry and expression must be defended. The organizations are united in their concern about recent increases in attacks on a wide range of material unequivocally protected by the First Amendment.

Since the establishment of the Committee, SCA participation has been handled through the national office. In order to continue this active participation following the move of the national office to Washington, D.C., Executive Secretary William Work has appointed SCA member Daniel R. Chandler to represent SCA on the Committee. FS readers are invited to communicate directly with Professor Chandler regarding any issues or concerns that they would like to share or for information about the Committee's work. His address is Box 511, F.D.R. Station, New York, New York 10022.

SENATOR WILLIAM PROXMIRE ON NUDITY AND FAIRNESS

Mr. President, the Supreme Court says that if I am driving or walking past a drive-in theater and I can see on its screen human nudity that distracts or offends me, I just should turn my eyes away.

The Supreme Court does not say I should turn off my radio or television set if I hear an opinion on an important public issue I disagree with. No, it says that I may complain and, under certain circumstances, it might even help me put the station off the air.

In a case involving a Jacksonville, Fla., drive-in theater that showed a movie containing nudity, the Court this week said, in effect, "If you do not like nudity, that is just too bad. Nobody is forcing you to look. Do you not know that the theater owner has first amendment rights? Besides, some people want to see those movies. They might not be able to if the owner can be forced to spend a lot of money to put up a big fence."

Mr. President, I do not disagree with the Jacksonville case. But I wonder why the Supreme Court in the past has not worried as much about free speech and free press rights when it comes to radio and television.

The Court in a 6-to-3 decision on Monday held invalid an ordinance that made it a public nuisance for drive-ins to exhibit movies showing human nudity if the screen were visible from a street or other public place.

The majority decision, written by Mr. Justice Powell, said:

> The Jacksonville ordinance discriminates among movies solely on the basis of content.

In a footnote to that sentence, it said that the issue in the case--

> is not the viewing rights of unwilling viewers but rather the rights of those who operate drive-in theaters and the public that attends these establishments. The effect of the Jacksonville ordinance is to increase the cost of showing films containing nudity . . . In certain circumstances theaters will avoid showing these movies rather than incur the additional costs. As a result persons who want to see such films at drive-ins will be unable to do so.

The city of Jacksonville argued that it wanted to protect its citizens against unwilling exposure to materials that may be offensive to them.

U.S., *Congressional Record*, 94th Cong., 1st Sess., S 11769-11774.

FREE SPEECH
Speech Communication Association
5205 Leesburg Pike
Falls Church, Virginia 22041